



In the Matter of:

**HARRY L. WILLIAMS,
SHERRIE G. FARVER,**

**ARB CASE NOS. 99-054
99-064**

COMPLAINANTS,

**ALJ CASE NOS. 98-ERA-40
98-ERA-32**

v.

DATE: July 13, 1999

**LOCKHEED MARTIN CORPORATION,
LOCKHEED MARTIN ENERGY SYSTEMS,
INC.,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant

Edward A. Slavin, Esq., *Deerfield Beach, Florida*

For the Respondent

Charles W. Van Beke, Esq., *Wagner, Myers & Sanger, P.C., Knoxville, Tennessee*

ORDER

On June 22, 1999, Complainants Sherrie Farver and Harry L. Williams filed a "Request for Extension of Time and Objection to Cynthia Atwood [sic] Deciding This Case." Respondent Lockheed Martin does not object to the Complainants' request for a two-week extension of time to file their rebuttal brief. However, Lockheed states that it has found no basis upon which to object to, or exclude Member Attwood.

In particular, Complainants allege that "It appears . . . that Ms. Atwood's [sic] serving on **any** case involving DOE or OSHA or the undersigned counsel would at best be an appearance of impropriety." Complainants' allegation of an appearance of impropriety is based on a Memorandum from Richard Fairfax, OSHA's Director of the Directorate of Compliance Programs, to John B. Miles, Jr., Regional Director, Occupational Safety and Health Administration, dated February 19, 1999. Fairfax's Memorandum apparently was written in response to correspondence that OSHA received from Complainants' counsel raising concerns about whistleblower investigations the OSHA Region VI office was performing. Fairfax states in his Memorandum that Complainants' counsel

previously corresponded with the Secretary about these concerns, and raised similar complaints about investigative work in other OSHA regional offices. Fairfax also states in his Memorandum that Complainants' counsel "has also asked for the recusal of all Administrative Law Judges who have presided over hearings for his clients, and made charges against Chief Administrative Law Judge John Vittone and Administrative Review Board Member Cynthia Atwood [sic]."

Complainants contend that the Fairfax Memorandum's reference to ARB Member Attwood "raises a clear question as to whether there was any an [sic] *ex parte* communication between Mr. Fairfax and a member of the ARB or its staff on matters being litigated before them." Lockheed responds that the Memorandum "conveys none of the facts, implications, or arguments contained in the complainants' objection."

The Board, of course, must consider carefully the allegation that a Board Member's participation in a case would raise an appearance of impropriety. However, we strongly disagree with Complainants' assertion that Fairfax's Memorandum raises a "clear" question as to the existence of any *ex parte* communication, whether direct or indirect, between Board Member Attwood and Fairfax. Member Attwood does not know Richard D. Fairfax, and to her knowledge has never had any direct or indirect communication with him. No Board Member has communicated with Fairfax, and we are not aware that any member of the Administrative Review Board's staff has communicated with Fairfax. We therefore conclude that Member Attwood's consideration of Complainant's case would not create an appearance of impropriety because Complainants' allegation that Member Attwood possibly engaged in *ex parte* communication with Richard Fairfax is baseless. Accordingly, Complainants' objection to Member Attwood's consideration of these cases is **DENIED**.

On June 24, 1999, Respondent Lockheed filed its response brief and a "Motion for Permission to File Brief which Exceeds Page Limitations." By order dated July 12, 1999, we denied this motion. We have returned Lockheed's briefs and given Lockheed two weeks from the receipt of the Board's order to submit a brief in conformance with the page limitations established in the Board's April 20, 1999 scheduling order. Complainants may file a rebuttal brief, exclusively responsive to the reply brief and not exceeding ten (10) double-spaced typed pages, on or before **August 26, 1999**. Accordingly, Complainants' Motion for an Extension of Time is **DENIED**, as it is now moot.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member